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No. 98-818

In The

Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native Organization in the United States. NCAI is dedicated to protecting the rights and improving the welfare of all indigenous peoples in the United States, to enlightening the public toward a better understanding of indigenous peoples, and to preserving indigenous rights. NCAI believes that Native Hawaiians are an indigenous people and that certain rights flow from that status.

SUMMARY OF ARGUMENT

The Indian Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, vests the federal government with the authority and flexibility to deal with all indigenous peoples within its geographical boundaries. Throughout this Nation's history, this Court has deferred to the political branches as to which peoples will be dealt with under the Indian Commerce Clause, subject only to this Court's oversight to ensure that no arbitrary characterization is made simply to bring a people under this power. *See United States v. Sandoval*, 231

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

U.S. 28, 47 (1913). The political branches of the federal government recognize the people indigenous to Hawai'i as coming within the terms of the Indian Commerce Clause and that decision is eminently reasonable.

The federal government has a "special relationship" with the indigenous peoples of the United States which insulates federal legislation dealing with those peoples from equal protection challenges "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . ." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). This rule applies whether the legislation deals with members of a federally recognized tribe or not. *See e.g., Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977).

The Fifteenth Amendment was not intended to affect the federal power to deal with indigenous peoples in any way. In practice, the federal government has authorized and funded hundreds of elections in which voting was restricted to indigenous peoples. If the Fifteenth Amendment were held to prohibit these elections, the ability of the federal government to carry out the responsibilities of its "special relationship" with indigenous peoples would be nullified.

Federal authority to deal with indigenous peoples may also be delegated to the states and state action can be ratified by Congress. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979). Congress has recognized Native Hawaiians as an indigenous people, has instructed the State of Hawai'i to use the resources from lands transferred to the State in 1959 for the betterment of

the conditions of the Native Hawaiian people, and has otherwise encouraged and endorsed Hawai'i's efforts to better their condition. Because Hawai'i's actions at issue in this case are consistent with actions taken by Congress, they are subject to and easily satisfy the *Mancari* test. *See id.* at 500-01.

ARGUMENT

I. THE CONSTITUTION EMPOWERS CONGRESS TO DEAL WITH ALL INDIGENOUS PEOPLES IN THE UNITED STATES

A. Introduction

When Columbus landed in the "New World" he encountered its indigenous peoples. Thinking that he had arrived in Asia, he referred to the indigenous peoples he encountered as "los Indios" – the Indians. *See* Robert F. Berkhofer, Jr., *The White Man's Indian*, 4-5 (1978). Although

> [t]he first residents of the Americas were by modern estimates divided into at least two thousand cultures and more societies, practiced a multiplicity of customs and lifestyles, held an enormous variety of values and beliefs, spoke numerous languages mutually unintelligible to the many speakers, and did not conceive of themselves as a single people – if they knew about each other at all. . . . [w]hites categorized the variety of cultures and societies as a single entity for the purposes of description and analysis. . . .

Id. at 3. These peoples constituted independent sovereigns whose existence predated the coming of the Europeans. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). The European nations dealt with these peoples primarily through treaties "formed as near as may be, on the model of treaties between the crowned heads of Europe." *Worcester*, 31 U.S. (6 Pet.) at 550. After the colonies achieved independence, "Congress assumed the management of Indian affairs; first in the name of these United Colonies, and afterward in the name of the United States." *Id.* at 558.

Article IX of the Articles of Confederation gave the "United States in Congress assembled the sole and exclusive right of 'regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided that the legislative power of any State within its own limits be not infringed or violated.' " *Id.* at 558-559. This inherently contradictory language was so construed by some states as to annul the power itself. *Id.* at 559.

The problems created by the language of the Articles were resolved in the United States Constitution. The states ceded to the federal government the exclusive power to make treaties. *See* U.S. Const. art. I, § 10, art. II, § 2, cl. 2, and the power to "regulate Commerce . . . with the Indian Tribes," *Id.* at art. I, § 8, cl. 3. *See also Worcester* at 561; *McClanahan v. Arizona Tax Comm'n.*, 411 U.S. 164, 172 n.7 (1973) (stating that federal authority derives from commerce and treaty provisions).

The dispute surrounding this case, in its broadest sense, is whether the indigenous people of Hawai'i fall

within the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as a people with whom the federal government may separately deal on a political basis. Petitioner, adopting a technical and restrictive reading of the Indian Commerce Clause, argues that the Clause does not extend to the indigenous people of Hawai'i because they are different from other indigenous peoples of the United States. This restrictive reading of the Indian Commerce Clause is inconsistent with a proper interpretation of the Constitution.

The indigenous peoples with which the framers of the Constitution were familiar were referred to as Indians and their political organizations denominated "nations" or "tribes." *See* Harold E. Driver, *Indians of North America*, 299-302 2d ed. (1969). The reference to Indian tribes in the Indian Commerce Clause was thus a natural one. But the ultimate geographical limits of the United States were unknowable at that time, as was the variety of indigenous peoples that occupied the Americas. *See id.* at 287-308. Subsequent to the adoption of the Constitution, Euro-Americans encountered indigenous peoples who were not ethnically Indian and whose organizational structures differed from that of eastern tribes. The Constitution has nonetheless proven flexible enough to encompass relations with all indigenous people within the geographic limits of the United States. This is as it should be with a document "to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as any human institution can approach it.' " *Weems v. United States*, 217 U.S. 349, 373 (1910). Were it otherwise, Congress would have been embarrassed in its dealings with

indigenous peoples long before Hawai'i entered the Union.

B. Federal Dealings with Indigenous Peoples Regardless of Differences in Land Tenure, Level of Organization, or Ethnicity are Given Great Deference by This Court

As the following discussion will demonstrate, Congress has historically exercised great flexibility in its dealings with indigenous peoples and this Court generally defers to such action.

1. The Case of the Pueblos of the Southwest

United States v. Sandoval, 231 U.S. 28 (1913), is instructive on two levels. It provides a specific example of flexibility in determining the reach of the Indian Commerce Clause, and further demonstrates the deference this Court has shown the political branches in its dealing with indigenous peoples. In *Sandoval*, the question was whether the Santa Clara Pueblo was Indian country for purposes of federal jurisdiction – whether the Pueblo were Indians within the meaning of the Indian Commerce Clause. *See id.* at 38. The Pueblo, unlike some other Indians, were a sedentary and agricultural people, and the Pueblo owned its land in communal fee simple under grants from the King of Spain which were confirmed by Congress.[2] *See id.* at 39-40. These differences did not bar

[2] The members of the Pueblo also made a claim to citizenship. *See Sandoval*, 231 U.S. at 48. The claim to citizenship

federal authority under the Indian Commerce Clause. The Pueblos' title to their land "was not fee simple title in the commonly understood sense of the term. Congress had recognized the Pueblos' title to their lands by statute, and Executive orders had reserved additional public lands 'for the [Pueblos'] use and occupancy.' " *Alaska v. Native Village of Venetie*, 522 U.S. 520, ___, 118 S. Ct. 948, 953 (1998). In addition, Congress had enacted legislation with respect to the lands 'in the exercise of the Government's guardianship over th[e] [Indian] tribes and their affairs,' including . . . restrictions on the lands' alienation." *Id.* at 48. "Congress *therefore* could exercise jurisdiction over the Pueblo lands, under its general power over 'all dependent Indian communities within its borders, whether within its original territory or *territory subsequently acquired*, and whether within or without the limits of a State.' " *Id.* (characterizing *Sandoval*) (emphasis added).

In other words, Congress had in the past treated Pueblos as Indians and the Court would defer to that determination, subject to one caveat:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in

was not passed upon because the Court felt that "citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people." *Id.* This effectively undermines petitioner's attempt to distinguish between Native Hawaiians and other indigenous peoples based on Native Hawaiians' citizenship from the date of annexation. Petitioner's Brief at 42-43, *Olson* (No. 98-818).

> respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

Sandoval, 231 U.S. at 46.

The Court in *Sandoval* was following long-established precedent in granting deference to the political branches in these matters. *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867). The same deference the Court showed to the political branches in *Sandoval* is appropriate here, where there is no question that Native Hawaiians are an indigenous people who, until federal complicity in its overthrow, were organized into an independent kingdom.

2. The Indian Commerce Clause Extends to Indigenous Peoples Irrespective of Their Organization As Tribes

Petitioner argues that Native Hawaiians should be excluded from the general rules of Indian law because they lack a political organization along tribal lines and this distinguishes them from Indians. Petitioner's Brief at 39, *Olson* (No. 98-818). But this distinction is irrelevant. Many Indians had political organizations much different from those of the eastern tribes. *See* Driver, *supra*, at 287-308. Some had "little or no tribal organization." *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979). In California, "tribes" in the political sense may not have existed. *See* Driver, *supra*, at 295. In *United States v. Washington*, the court noted that:

> One writer maintains: 'Tribe is most appropriately a cultural concept. Except for some eastern woodland confederacies, few Indians had tribal organizations that governed their activities.' G. Taylor, *The New Deal and American Indian Tribalism* 2 (1980).
>
> See also Elser v. Gill Net Number One, 246 Cal.App.2d 30, 38, 54 Cal. Rptr. 568, 575 (1966) ('tribe,' applied to California Indians, must be understood as synonymous with ethnic group rather than as denoting political unity because tribes in a political sense did not exist in California . . .)

641 F.2d 1368, 1373 n.6 (9th Cir. 1981) (internal quotes omitted).

Yet, as this country expanded westward, contact with Indians who lacked the political organization characteristic of the eastern tribes proved no impediment to federal dealings with them: "[T]he record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties." *Fishing Vessel Ass'n*, 443 U.S. at 664 n.5.

As pointed out in the *Handbook of Federal Indian Law*: "Congress has created 'consolidated' or 'confederated' tribes consisting of several ethnological tribes, sometimes speaking different languages."[3] Felix S. Cohen, *Handbook*

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[3] "Examples are the Wind River Tribes (Shoshone and Arapahoe), the Cheyenne-Arapaho Tribes of Oklahoma, the Cherokee Nation of Oklahoma (in which the Cherokees,

of Federal Indian Law, 6 (1982 ed.). A specific example of consolidation is mentioned in *Washington v. Yakima Nation*:

> The Confederated Bands and Tribes of the Yakima Indian Nation comprise 14 originally distinct Indian tribes that joined together in the middle of the 19th century for purposes of their relationships with the United States. A treaty was signed with the United States in 1855, under which it was agreed that the various tribes would be considered 'one nation' and that specified lands would be set aside for their exclusive use.

439 U.S. 463, 469 (1979). "On the other hand, Congress has sometimes divided a single tribe, from the ethnological standpoint, into a number of tribes or 'bands.'" Cohen, *supra*, at 6.[4]

The Indian Reorganization Act, 25 U.S.C. §§ 461-479, provides a mechanism for the creation of tribes. Section 19 defines "Indian" to include members of recognized

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Delawares, Shawnees and others were included), and the Confederated Salish and Kootenai Tribes of the Flathead Reservation." Cohen, *supra*, at 6.

[4] "Examples are the Chippewas, the Sioux, and several groups which remained behind when the majority of their members were removed west during the mid-nineteenth century." *See, e.g., United States v. John*, 437 U.S. 634 (1978) (Choctaws remaining in Mississippi after most moved west); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977) (Delaware Tribe divided into 'Kansas Delawares' and 'Absentee Delawares'); *United States v. Boyd*, 83 F. 547 (4th Cir. 1897) (Eastern Band of Cherokees in North Carolina a 'tribe' even though main body of tribe had moved to Oklahoma)." *Id.* at 6 n.26.

Indian tribes as well as "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . all other persons of one-half or more Indian blood. . . . " and further provides that "The term 'tribe' wherever used in [this Act] shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479 (1994).

This provision, along with other provisions of the Act, has been used as a basis to form new tribes. Section 5 of the Indian Reorganization Act provides that the

> Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, . . . within or without existing reservations, . . . for the purpose of providing land for Indians. . . . Title to any lands or rights acquired pursuant to [this Act] shall be taken in the name of the United States in trust for the Indian tribe *or individual Indian* for which the land is acquired . . .

25 U.S.C. § 465 (1994) (emphasis added). Once individuals become beneficiaries of land held in trust they can organize themselves as a government and, as a 'reservation' tribe or band, become eligible for organization under the IRA. Cohen, *supra*, at 15.[5]

Congress has also legislated as to groups of indigenous peoples which had no tribal status and for whom

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[5] *See* Cohen, *supra*, at 15 and n.86 for a listing of tribes for whom this procedure has been followed.

tribal status was never intended. The Indian Claims Commission Act (ICCA) was passed to provide a remedy for many of the injustices suffered by the indigenous peoples of the United States. The Act provided that, "[t]he Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska. . . . " Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946). The Justice Department, charged with defending these claims, early on argued that to come within the statute, any group had to "possess the characteristics of a 'tribe' or 'band,' which are, mainly, a common government or leadership, continuity of existence and concert of action." *Loyal Creek Band or Group of Creek Indians v. United States*, 1 Indian Cl. Comm. 122, 127 (1949). The Commission and Court of Claims rejected the Government position and held that if "the group can be identified and it has a common claim, it is . . . an 'identifiable group of American Indians' " and can bring a claim under the ICCA. *Id.* at 129 (1949). *See also Peoria Tribe v. United States*, 169 Ct. Cl. 1009 (1965); *Nooksack Tribe v. United States*, 162 Ct. Cl. 712 (1963), *cert. denied*, 375 U.S. 993 (1964).

This Court has likewise recognized the obligations, under federal legislation, of newly formed bands of Indians that were not tribes. The Indian Depredations Act of 1891 gave to the Court of Claims jurisdiction over "[a]ll claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or

agent in charge, and not returned or paid for." Act of Mar. 3, 1891, ch. 538, § 1, 26 Stat. 851. The question arose as to whether, when only a portion of a tribe committed depredations, the tribe from which the band had separated was liable for the depredations. In *Montoya v. United States*, 180 U.S. 261, 269-270 (1901), members of several tribes formed a new band and the Court found them to fall within the statute.

Thus, historically, federal dealings with this country's indigenous peoples has never depended upon their organization into tribes. Petitioner's attempt to distinguish the situation in Hawai'i because of the present lack of a federally recognized tribe is unavailing.

3. The Indian Commerce Clause Extends to All of The Indigenous Peoples of Alaska, Some of Whom, Like Native Hawaiians, Are Not Ethnically Indian

"The term 'Natives of Alaska' has been defined to include all members of the aboriginal races inhabiting Alaska at the time of its annexation to the United States, and their descendants."[6] Felix S. Cohen, *Handbook of Federal Indian Law*, 401 (1942 ed.) [hereinafter Cohen, 1942

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[6] The following are some of the statutory provisions defining ["Natives of Alaska"]:

The Act of June 25, 1938, 52 Stat. 1169, amending the Alaska game law, defines "Indian" to include "Natives of one-half or more Indian blood," and "Eskimo" to include "Natives of one-half or more Eskimo blood."

Sec[tion] 2 of the Act of April 16, 1934, 48 Stat. 594, 596, which grants special fishing privileges to "native Indians," defines "native Indians" to mean "members of the aboriginal

Handbook]. Alaska's aboriginal races include Eskimos, which are distinct from Alaska's two other aboriginal groups, Indians and Aleuts. *See id.*

That Congress' power extended to the aboriginal peoples of Alaska in the same manner that it applied to Indians in the contiguous 48 States is reflected in the 1867 Treaty of Cession, by which the United States acquired Alaska from Russia. The third article of that Treaty provided in pertinent part:

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races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood."

Section 15 of the Reindeer Act of September 1, 1937, 50 Stat. 900, 902, defines the term "natives of Alaska" as meaning –

> the native Indians, Eskimos, and Aleuts of whole or part blood inhabiting Alaska at the time of the Treaty of Cession of Alaska to the United States and their descendants of whole or part blood, together with the Indians and Eskimos who, since the year 1867 and prior to the enactment hereof, have migrated into Alaska from the Dominion of Canada, and their descendants of the whole or part blood.

Sec[tion] 19 of the [Indian Reorganization] Act of June 18, 1934, 48 Stat. 984, 988, provides: "For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians."

C. 80, section 142 of the Penal Code of Alaska, Act of February 6, 1909, 35 Stat. 600, 603, which makes the sale of liquor to Indians a crime, provides:

> That the term "Indian" . . . shall be construed to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood, who have not become citizens of the United States.

Felix S. Cohen, *Handbook of Federal Indian Law*, 401 n.1 (1942 ed.).

> The inhabitants of the ceded territory . . . [may] remain in the ceded territory [and], with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States. . . . The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

Cohen, 1942 *Handbook, supra*, at 402. That provision was interpreted in *In re Minook*, as giving "the Indian tribes of Alaska the same status before the law as those of the United States." 2 Alaska 200, 221 (D. Alaska 1904).[7]

Later opinions by the Interior Department Solicitor General's Office confirmed that Alaska Natives were subject to the same principles that apply to Indians in the contiguous 48 States. For instance, in 1923, the Solicitor issued an opinion describing the status of Alaska Natives which concluded that "[t]he relations existing between [the Alaska Natives] and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States. . . . " 49 I.D. 592, 593 (May 18, 1923) *reprinted in* 2 Opinions of the Sol. of the Dep't of the Interior Relating

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[7] Other decisions from that era analogizing the legal status of Alaska Natives to that of Indians generally include *Nagle v. United States*, 191 F. 141 (1911) (Native Alaskans eligible for General Allotment Act citizenship provision) and *United States v. Berrigan*, 2 Alaska 442 (D. Alaska 1905) (describing United States' relationship to Native Alaskans as that of "guardian" to "dependent ward" and prohibiting disposition of Native land to non-natives without federal approval).

to Ind. Affairs [hereinafter Sol. Op. On Ind. Affairs] 207, 6. This view was reaffirmed nine years later in a comprehensive Solicitor's Opinion on the "Status of Alaska Natives," which was submitted to Congress in 1932. *See* 1 Sol. Op. On Ind. Affairs 303. The 1932 Opinion concluded that:

> From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not *as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States.*

Id. at 310 (Emphasis added). *See also* "Validity of Marriage by Custom Among the Natives or Indians of Alaska," 54 I.D. 39 (Sept. 3, 1932), *reprinted in* 1 Sol. Op. On Ind. Affairs 329 (opining that marriage among Alaska Natives maintaining their tribal relations should be governed by the laws and customs of the Alaska Native tribes).

In 1942, Felix Cohen set forth the Department of the Interior's view of the legal status of Alaska Natives as follows:

> It is now substantially established that [Alaska Natives] occupy the same relation to the Federal Government as do the Indians residing in the United States; that they, their property, and their affairs, are under the protection of the federal Government; that Congress may enact such legislation as it deems fit for their benefit and protection; and that the laws of the United States with respect to the Indians resident within the boundaries of the United States

> proper are generally applicable to the Alaska natives.

Cohen, 1942 *Handbook, supra,* at 404.

This backdrop of legal opinion is significant given the absence of treaties and the existence of only a few reservations in Alaska. It is also significant given that the political status of Alaska Natives tribes *qua* tribes had not yet been clarified.[8] The Solicitor's conclusions establish the existence of the basic underlying special relationship, and therefore, the constitutional bases for specific acts of Congress and the Executive.

The Court recognized in *Sandoval* that Congress cannot arbitrarily extend its power under the Indian Commerce Clause to peoples that are not in fact indigenous. There has never been a suggestion that the exercise of federal power over all of the aboriginal peoples of Alaska runs afoul of the Indian Commerce Clause. To the contrary, this Court in *Alaska v. Native Village of Venetie* recognized Congress' power over Alaska Natives by stating that "[whether] the concept of Indian country should be modified is a question entirely for Congress." 522 U.S. at

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[8] Indeed, the political status of Alaska Native villages as tribes was only clarified in 1993 with the issuance of a List of Federally Recognized Tribes which acknowledged more than 200 Alaska Native villages as federally recognized sovereign tribes. *See* 58 Fed. Reg. 54,364 (1993). The Secretary explained that "[t]he purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) [(1993)] and to eliminate any doubt . . . [as to whether] the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states." 58 Fed. Reg. 54,365 (1993).

___, 118 S. Ct. at 956. So too, the question whether a "special relationship" exists between the United States and Native Hawaiians is "a question entirely for Congress." *Id.*

II. FEDERAL LEGISLATION CONCERNING NATIVE HAWAIIANS NEED ONLY BE RATIONALLY RELATED TO CONGRESS' UNIQUE OBLIGATION TO INDIGENOUS PEOPLES

The Federal Government has, through extensive legislation and course of dealings, established a "special relationship" with the indigenous peoples of the United States. This special relationship protects such legislation from the same scrutiny that applies to legislation dealing with other minorities. *See Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). Petitioner argues that the standard of review enunciated in *Mancari* applies only to legislation dealing with Indians who are members of a federally recognized Indian tribe, Petitioner's Brief at 39, *Olson* (No. 98-818), and that all other such legislation is subject to strict scrutiny in ascertaining whether it violates equal protection. *Mancari* does not so hold, and the cases of this Court are all to the contrary.

A. *Mancari* Involved Members of Federally Recognized Tribes and Did Not Speak to the Issue of Non-Members

In *Mancari*, non-Indian employees of the Bureau of Indian Affairs challenged an employment preference for Indians, which was authorized by the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. §§ 461-479 (1994). *See*

Mancari, 417 U.S. at 538-39. The scope of the authorized preference was restricted by BIA policy to those Indians of "one-fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe." *Id.* at 553 n.24 (citing 44 BIAM 335, 3:1). The non-Indian employees challenged the preference as constituting invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *See id.* at 539.

The Court recognized two Constitutional bases for Congressional legislation passed for the benefit of Indians. First, the Constitution "singles Indians out as a proper subject for separate legislation," in article I, section 8, clause 3 which provides Congress with the power to "regulate Commerce . . . with the Indian Tribes." *Id.* at 552. Second, the federal government made treaties with the tribes under article II, section 2, clause 2. *See id.* In a passage equally descriptive of United States' dealings with Native Hawaiians, this Court described the origin and nature of the special relationship as follows:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . .

Id. at 552 (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715, 87 L.Ed. 1094, 63 S.Ct. 920 (1943)).

The Court rejected the notion that the preference was granted to "Indians . . . as a discrete racial group." *Id.* at 554. The preference was applied rather to "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* Thus, the Court did not apply strict scrutiny to the preference, but rather held that, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. The regulation at issue required membership in a tribe, but later decisions indicate that membership in a federally recognized tribe is not necessary for the test to apply.

B. This Court Has Applied the *Mancari* Test to Legislation Involving Indians Who Were Not Members of a Federally Recognized Tribe

Petitioner argues that the federal government can have a special relationship only with federally-recognized tribes and their members. Petitioner's Brief at 39-40, *Olson* (No. 98-818). Contrary to Petitioner's assertion the special relationship can exist where there is no federally recognized tribe or no tribe at all.

1. Members of Tribes Whose Government To Government Relationship With the United States Has Been Terminated May Nevertheless Continue to Hold Special Rights

In *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968), the Court upheld a decision by the Court of Claims that the Menominee Tribe possessed hunting and

fishing rights under the 1854 Wolf River Treaty, and that those treaty rights were not abrogated by the Menominee Indian Termination Act of 1954. Treaty rights are one of the clearest manifestations of the special relationship between the United States and Indian tribes. Yet, notwithstanding the Congressional termination of the government to government relationship between the Menominee Tribe and the United States, the Menominee Tribe continued to possess its treaty rights. *See id. Menominee* was successfully relied upon to uphold the hunting and fishing rights of the Klamath Tribe, whose government to government relationship had also been terminated. *Kimball v. Callahan*, 493 F.2d 564, 567-69 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974).

In the Alabama-Coushatta Termination Act, 25 U.S.C. §§ 721-728 (1994), Congress provided for termination of the trust relationship between the Tribe and the United States, but further provided: "That after August 21, 1954 such Indians shall be eligible for admission, on the same terms that apply to other Indians, to hospitals and schools maintained by the United States." 25 U.S.C. § 722 (1994).[9]

These authorities show indisputably that a federally recognized tribe need not be involved at all for Indians to hold special rights. Other cases demonstrate that

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[9] Other federal statutes conferring benefits on Native Americans provide that terminated tribes fall within their scope. *See, e.g.*, Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c) (1994); Native American Languages Act, 25 U.S.C. § 2902(1)-(2) (1994).

Congress' power exists even when Indians are not members of any tribe.

2. *Weeks* Applied the *Mancari* Test to a Congressional Distribution Scheme Allowing Benefits to Some Indians Who Were Not Members of a Tribe, While Denying Benefits To Other Indians Not Members of a Tribe

In *Delaware Tribal Business Comm. v. Weeks*, a group of Indians, not members of any tribe, challenged, on equal protection grounds, a congressional distribution scheme excluding them from sharing in an award from the Indian Claims Commission. *See* 430 U.S. 73, 75 (1977). The distribution scheme did allow participation by other Indians who were "closely affiliated with," 430 U.S. at 86, or "clearly identified with" 430 U.S. at 89 n.22 a tribe but not members of the tribe. Indians excluded from the distribution were descendants of Indians who had chosen to remain in Kansas (Kansas Delawares) and "dissolve their relations with their tribe," after their tribe had relocated to Oklahoma. *See id.* at 78 (citation omitted). The Indian Claims Commission held that prior to the relocation, the United States had breached its trust duty to the tribe by selling certain tribal lands at private sale certain lands rather than at public sale, thus reducing the Kansas Delawares' pro rata share of assets received when they left the tribe. *See id.* at 78-79.

The Court held "that the legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . . " *Id.* at 85 (quoting

Mancari, 417 U.S. at 555). *Weeks* constitutes clear application of the *Mancari* principle to a situation where tribal Indians were not involved.

3. *United States v. John* Upheld the Provisions of the IRA as Applied to Indians Not at That Time a Tribe

In *United States v. John*, 437 U.S. 634 (1978), this Court reviewed the conviction of Smith John, a Choctaw Indian, under state law. The Court reviewed Choctaw history and found that the federal government had made several efforts to remove the Choctaws from the state of Mississippi, including the Treaty at Dancing Rabbit Creek. That Treaty, in addition to providing for removal also allowed Choctaws to "remain and become a citizen of the State," to receive land and not to "lose the priviledge of a Choctaw citizen." *Id.* at 641 (quoting Treaty at Dancing Rabbit Creek, Sept. 27, 1830, U.S. – Choctaw Tribe, 7 Stat. 333).

In the 1930s, the federal Indian policy had shifted back to preserving Indian communities, as reflected in the Indian Reorganization Act of 1934. *See id.* at 645. The Mississippi Choctaws voted to accept the provisions of the Act. *See id.* at 645-646. In 1939 Congress passed an act placing title to all the lands previously purchased for the Mississippi Choctaws in trust, and in 1944, the Secretary of the Interior proclaimed the lands a reservation. *See id.* at 646. In 1945, the Mississippi Band of Choctaw Indians adopted a constitution under the Indian Reorganization Act and the constitution was duly approved by the federal authorities in 1945. *See id.* at 646.

The Mississippi Supreme Court had held that the 1944 proclamation had no effect because the Indian Reorganization Act was not meant to apply to the Mississippi Choctaws. *See id.* at 649. This Court disagreed since the IRA defined "Indians" to include "all other persons of one-half or more Indian blood" even if not members of a recognized tribe. *Id.* at 650. The Court rejected the argument that federal powers over the Choctaw were lessened by the history of federal neglect and unchallenged state jurisdiction. *See id.* at 652-53. "Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." *Id.* at 653. This Court's recognition of federal authority to deal with a remnant of a tribe striving to establish its own sovereignty is clear precedent for federal authority to deal with Native Hawaiians who likewise seek to reestablish their sovereignty.

Menominee, *Weeks*, and *John*, all conspicuously absent from Petitioner's brief, destroy the proposition that Congress' power to create a special relationship depends on the existence of a federally-recognized tribe. Congress in fact legislates today generally as to indigenous peoples without regard to tribal status. *See, e.g.*, National Housing Act, 12 U.S.C. §§ 1701, 1715z-13a(1)-(3) (1994); Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c) (1994); Indian Land Consolidation Act, 25 U.S.C. § 2201(2) (1994); Indian Civil Rights Act, 25 U.S.C. § 1301(4) (1994).

C. The Fifteenth Amendment Did Not Affect Federal Dealings with Indigenous Peoples

Petitioner and *amici* in support of Petitioner argue that the Fifteenth Amendment to the Constitution forbids any restriction on voting rights in any kind of election, whether such election occurs in relation to indigenous affairs or not. The Civil War Amendments were not intended to affect Indian affairs. The text of the Fourteenth Amendment, in describing representation of states in Congress removed the three-fifths representation of slaves that was in article I, section 2, clause 3, but it retained and repeated the exclusion of "Indians not taxed" from representation. *See* U.S. Const., 14th amend. § 2. In the 1870s, that phrase indicated that Indians remained outside the political system. The Fifteenth Amendment was adopted about a year and a half after the Fourteenth Amendment, apparently because of some doubt as to whether the 14th prohibited racial discrimination in elections. The Fourteenth Amendment provides that:

> [W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const., 14th amend. § 2.

Arguably this amendment allowed states willing to suffer that penalty to exclude former slaves and other blacks from voting. The Fifteenth Amendment removed any doubt on that score. *See United States v. Reese*, 92 U.S. 214, 217-18 (1875). But neither the Fourteenth nor Fifteenth Amendments affected federal action involving Indians. *Elk v. Wilkins*, 112 U.S. 94 (1884) (Fourteenth and Fifteenth Amendments not violated by denial of Indian's right to vote in city election).

Innumerable elections sponsored by the federal government have been restricted to persons with Indian blood. More than 100 IRA governments were set up as a result of federally conducted elections among groups of Indians. *See* T. Haas, *Ten Years of Tribal Government Under I.R.A.* 17 (U.S. Indian Service, Tribal Relations Pamphlet No. 1 (1947) cited in *John*, 437 U.S. at 646 (copy lodged with the Co[illegible]. Several tribes, like the Menominee, were terminated, then restored with federally conducted elections among the former members. The Menominee Restoration Act dealt with eligible voters for the Menominee Restoration Committee as follows:

> In the absence of a completed tribal roll prepared pursuant to subsection (c) of this section and solely for the purposes of the general council meeting and the election provided for in subsection (a) of this section, all living persons on the final roll of the tribe published under section 893 of this title, and all descendants, who are at least eighteen years of age and who possess at least one-quarter degree of Menominee Indian blood, of persons on such roll shall be entitled to attend, participate, and vote

> at such general council meeting and such election.

25 U.S.C. § 903(b). In addition, Native-only elections are held in state-chartered corporations pursuant to the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1606(g), (h)(1)(2) (1994); *see generally* 43 U.S.C. §§ 1601-1629a (1994). These elections, so necessary to the "special relationship" between the federal government and its indigenous peoples are outside the reach of the Fifteenth Amendment.

III. HAWAI'I HAS DEALT WITH NATIVE HAWAIIANS AS AN INDIGENOUS PEOPLE IN A MANNER CONSISTENT WITH FEDERAL LAW AND POLICY

The United States has expressly confirmed that the Hawaiian people are an "indigenous . . . people." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993); and in the 1994 Native Hawaiian Education Act, 20 U.S.C. § 7902(1) (1994) ("Native Hawaiians are a distinct and unique indigenous people . . . "). Congress has also recognized and confirmed the existence of a "special relationship" between the United States and Native Hawaiians. *See* 1994 Native Hawaiian Education Act, 20 U.S.C. § 7902(7)-(13) (1994) (discussing the Hawaiian Homes Commission Act, Act of July 9, 1921, ch. 42, 42 Stat. 108 (1921), the 1959 Admission Act, Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959), and other statutes expressing the special relationship). "In recognition of the special relationship which exists between the United

States and the Native Hawaiian people, the Congress has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities . . . " *Id.* at 7902(13).[10]

The federal government can and has delegated some authority in indigenous matters to Hawai'i and has ratified Hawai'i's actions toward Native Hawaiians as well. *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979).[11] NCAI relies on the brief of Respondent and *amicus* OHA for a detailed discussion of these issues, but would note generally that the United States has acknowledged responsibility for the illegal overthrow of the Kingdom of Hawai'i, "the sovereign, independent, internationally recognized, and indigenous government of Hawai'i," 20 U.S.C. § 7902(5) (1994), and also specifically:

> (2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii . . . with Native Hawaiians;
>
> (4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the

[10] In addition to the statutes listed in that provision, see a more complete listing of legislation treating Native Hawaiians the same as Indians in Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 106 n.67 (1998).

[11] There are other examples of delegation of the federal authority over Indian affairs to states. *See, e.g, Alabama-Coushatta Indian Tribe of Texas v. Mattox*, 650 F.Supp. 282, 289 (W.D. Tex. 1986) (discussing transfer of the entire trust responsibility from the federal government to Texas).

> United States and the Native Hawaiian people; . . .

107 Stat. at 1510. A movement to restore self-determination to Native Hawaiians, consistent with the Apology Resolution, and having the support of the State of Hawai'i is in process.[12] Hawai'i's efforts to honor federal and state commitments to Native Hawaiians is clearly compatible with federal law and should be insulated from strict scrutiny.

Congress has expressed a general intent in the Apology Resolution to finish the job that it began with the Hawaiian Homes Commission Act, Act of July 9, 1921, ch. 42, 42 stat. 108 (1921), the Admissions Act, Act of March 18, 1959, Pub. L. No. 86-3, 73 stat. 4 (1959), and additional legislation throughout the years of restoring the proper place of Native Hawaiians among this country's self-governing indigenous peoples. Hawai'i's actions at issue here further that general goal and should not be disturbed.

[12] An Act Relating to Hawaiian Sovereignty, ch. 359, § 1(6), 1993 Haw. Sess. Laws 1009, 1010; An Act Relating to Hawaiian Sovereignty, ch. 200, § 1, 1994 Haw. Sess. Laws 479, 479; An Act Relating To The Public Land Trust, ch. 329, § 1, 1997 Haw. Sess. Laws 2072, 2072.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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